No. 3857

# United States Circuit Court of Appeals

## For the Ninth Circuit

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant in Error.

## Brief of Defendant in Error

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The Statement of the Case by the plaintiff in error is substantially correct.

### ARGUMENT AND AUTHORITIES

I.

The tax imposed under Chapter 156, Laws 1921, Sections 2381 to 2396, Inclusive, Revised Codes of 1921, is a license or privilege tax.

State vs. Hammond Packing Co., 45 Mont. 343.

This case was affirmed by the United States Supreme Court.

See 233 U. S. 331; 58 L. Ed. 985;
Provident Institution vs. Mass., 6 Wall. 611;
Askren vs. Continental Oil Co., 252 U. S. 444, 448; 64 L. Ed. 654;
Home Ins. Co. vs. N. Y. 134 U. S. 594;
Soc. for Savings vs. Coit, 6 Wall. 594;
Northwestern Mutual Life Ins. Co. vs. Lewis & Clark County, 28 Mont. 484; 72 Pac. 982;
Scottish, etc. Ins. Co. vs. Herriott, 80 N. W. 665;
Equitable Life Assurance Co. vs. Hart, 55 Mont. 76, 173 Pac. 1062.

## II.

## THE VALIDITY OF THE TAX IS NOT DETERMINED BY THE MODE OF LEVY.

In the case of Maine vs. Grand Trunk, 217 U. S. 236, 35 L. Ed. 994, 995, Mr. Chief Justice Fuller, speaking for the Court, said:

> "As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule

of apportioning the charge to the receipts of the business would seem to be eminently reasonable and likely to produce the most satisfactory results, both to the State and the corporation taxed."

## III.

## THE ACT IS NOT RETROACTIVE.

The Act imposing the license tax merely requires the payment, at a given time subsequent to its enactment, of a sum measured by preceding sales for the privilege of engaging in the business named. The tax is imposed upon the privilege of engaging in business after the passage of the act, the value of the privilege being determined by reference to past sales.

Conn. Mutual Life Ins. Co. vs. Kellsey, 101 N. Y. S. 902, affirmed in 80 N. E., page 1116;
Billings vs. U. S., 232 U. S. 261, 282; 58 L. Ed. 596;
Flint vs. Stone-Tracy Co., 220 U. S. 107; 55 L. Ed. 389;
Patton vs. Brady, 104 U. S. 608, 17 R. C. L. 501, et seq;
Gray's Limitation of Taxing Power, p. 53, Sec. 67, and p. 695, Sec. 1403 (a) et seq;
State vs. Bell, 61 N. C. 76.

In the case of Connecticut Mutual Life Ins. Co. vs. Kellsey, supra, the statute which was enacted in March provided for payment of the license tax in July of the same year, to be measured by the gross amount of premiums for the preceding calendar year. The Court, in holding it constitutional, used the following language:

"The statute clearly defines what tax it was which was imposed. The relator was found here

in this state exercising its corporate franchises and carrying on its business in its corporate and organized capacity, when it was required to make its report to the Comptroller and when the tax under this statute was made payable. It was therefore liable to pay the annual tax imposed under this statute for the privileges it enjoyed. Upon paying the tax so imposed the relator was exempt from any further tax under this section until the time when, pursuant to it, the next annual tax was made payable. The tax is in no sense a tax upon the relator's property or business 'during the year 1904,' but it was a tax for the exercising of such privileges, based, as the Legislature had a right to base it, upon its gross premiums received here during such year; that is, the prior calendar year The tax is not a retroactive one, but was imposed upon the relator because it was here within this state exercising such privileges at the time it was required to report and at the time when the tax was payable.

"The amendatory act of 1905 (Chapter 94, p. 131) became a law March 23rd of that year; and it is urged that it could properly have no retroactive effect, and therefore that a tax for the privilege of doing business during the year 1904, or during that part of the year 1905 prior to the taking effect of the amendment, cannot be sustained for constitutional reasons. But the act of 1905 was not the first one imposing a franchise tax upon foreign insurance corporations, and prior to the amendment such corporations were taxable at the same rate as under the amendment on the gross amount of premiums received during the preceding calendar year for business done in this state. The tax not being one upon property, but being a franchise tax for privileges enjoyed, based upon the gross premiums received in the state for a certain defined period, and payable at a definite time once each year by all insurance corporations

exercising such privileges in the state, was clearly within the legislative power to impose. People ex rel. U. S. A. P. P. Co. vs. Knight, 174 N. Y. 475, 67 N. E. 65. The act imposing it, so construed, is not in any sense retroactive, and therefore the arguments aimed against its validity from a constitutional point of view have no force."

IV.

It is believed that the Act is not affected by Section 3 of the Revised Codes of 1921 which provides that: "No law contained in any of the Codes or other statutes of Montana is retroactive unless expressly so declared," for the reason that it operates prospectively to require on March 31, 1921, the payment of a license for a privilege whose value is ascertained by using as a measure the sales made between January 1, 1921, and March 31, 1921.

If Section 4 of Chapter 156 should be construed to be retroactive in its operation, it must be because this section specifically refers to the quarter preceding March 31, 1921, and it would necessarily follow that the Act expressly declares its retroactive application within the meaning of Section 3, Revised Codes of 1921.

In the case of Billings vs. United States, 232 U. S. 261, 282, the Court said:

"Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. Flint vs. Stone-Tracy Company, 220 U. S. 107 and authorities there

cited. While the rule is that statutes should be so construed as to prevent them from operating retroactive, that principle is one of construction and not of reconstruction and therefore does not authorize a judicial reenactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision and therefore the amount due for excise was rightfully imposed and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. Flint vs. Stone-Tracy Company, 220 U. S. 107; McCray vs. United States, 195 U. S. 27; Knowlton vs. Moore, 178 U. S. 41. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. McCray vs. United States, 195 U. S. 27 and authorities there cited."

V.

The Act does not provide an unreasonable or unjust classification.

The validity of a tax cannot be questioned because it does not operate with absolute equality and justice upon all.

In the case of Flint vs. Stone-Tracy Co., 220 U. S. 107, the Court said:

> "It is contended that measurement of the tax by the net income of the corportaion or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.
>
> "It is true that in the Spreckles Case, 192 U. S. supra, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise. The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the Spreckles Case, and the measure of taxation, the income from all sources was doubtless inserted to prevent the limitation of the measure-

ment of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule sustained in this court are not wanting."

It was held in the case of Clark vs. Titusville, 184 U. S. 329, that licenses graded in amount by incomes in excess of fixed sums and less than other fixed sums with a difference in amount of $10,000 were not unconstitutional because one within a certain class might pay no more license than another though his income might be almost $10,000 more.

See also State vs. Winchell, 86 So. 181, where it was held that a dealer in pistols doing a business just in excess of $2500.00 was not discriminated against by reason of the fact that he was required to pay the same license as a dealer doing a business just under $5,000.00.

## VI.

The only contention made by appellant on this appeal is that the Legislature did not intend the license to be based upon sales made prior to its taking effect, but only on sales made subsequent to that date, the argument being that, as the Act requires a license only for engaging in business subsequent to March 5th, Section 3 should be construed as though it read:

"Every dealer shall, in that part of the year 1921, after March 5th, that he shall engage in business, pay a license tax equal to 1c for each

gallon of gasoline and distillate sold or distributed by him during such part of said year."

The strongest argument against this contention is that, had the Legislature intended the Act to be so construed, it certainly would have made the slight change in this section suggested by counsel's statement, or used some other language equally plain, simple and incapable of any ambiguity. If we admit that the legislative intent was that Section 3 should read as suggested, it is possible that Section 6 could be construed to cover only that part of the quarter ending March 31st subsequent to March 5, 1921, but standing alone or read in connection with Section 3, its plain and obvious meaning is that every dealer must make out a statement within thirty days after the end of the quarter, showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter. Nor does Section 5, which merely requires a record of all sales to be kept for the inspection of the Board of Equalization, aid in any way the construction contended for. This requirement is merely for the convenience of the agents and officers of the Board, and, while it could have no reference to sales made prior to taking effect of the Act, it is in no way inconsistent with other provisions requiring sales, made during that part of the first quarter prior to March 5, 1921, to be accounted for. However, as suggested in the opinion of the lower court:

> "The Act says plainly enough that dealers 'for the year 1921' and thereafter shall pay the tax in respect to sales 'during each year,' in "quarterly installments,' 'beginning with the quarter ending

> March 31, 1921, (for the 'year,' '1921,' and 'quarter ending March 31, 1921,' as generally in statutes import the calendar year and quarter and without apportionment for that part of the year and quarter that had expired before the act's approval. And this is retroactive intent 'expressly so declared,' within the meaning of Sec. ———, supra."

The case of Dodge vs. Nevada National Bank, 109 Fed. 726, cited in appellant's brief on the proposition that a statute should not be given a retroactive operation unless the language of the Act clearly gives it this effect, was a case where a statute, making National bank shares, assessable, became a law on March 14th. The constitution required a statement from each taxpayer of all real and personal property owned by him on 12:00 o'clock M, the first Monday in March. The question then was whether the act was effective for the year in which it became a law. The Court said:

> "Conceding for the purpose of this discussion that the Legislature had the power to make this statute retroactive as is held in several of the cases cited by appellant, the fact is that it did not do so. There is no language used in the act evidencing any such intent."

In that case the tax was clearly upon the shares of stock, and not upon the privilege of doing business, and there was nothing in the Act indicating an intent to make the Act retroactive.

The case of Schwab vs. Doyle, Advance Opinions U. S. Supreme Court, June 1, 1921, cited by appellant, involved the construction of the Federal Inheritance Act of September ——, 1916, and whether it was retro-

active so as to cover transfers made long prior to that date and necessarily without any intent to avoid the provisions of the statute, we submit is not in point.

The cases of Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150; Barber vs. Connolly, 113 U. S. 27; Connolly vs. Union Sewer Pipe Co., 84 U. S. 540 are not in point.

We submit that the Act in question violates no constitutional right of plaintiff in error and that it is clearly the intent of the act to take into account business transacted during that part of the first quarter of 1921, prior to the date of its taking effect; that it does not provide an unreasonable or unjust classification, and that the lower court did not err in sustaining the demurrer to the amended complaint.

Respectfully submitted,

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